connection it was submitted that, although limitation was not pleaded in the statement of defence, the defendant had raised it in paragraph 10 of his affidavit in opposing the plaintiff's application for leave to sign final judgment.

The main contention by counsel for the appellant in support of these two grounds was that the additional assessments of income tax for the years of assessment 1953 and 1958 were statute barred because they were not made before the expiration of 12 years from the respective years of assessment. For this he relied on section 91(1) of the Act which reads as follows:—

"The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year."

Counsel for the respondent on the other hand contended that there was wilful default on the part of the appellant in that he failed to disclose part of his income when he submitted his returns for the years of assessment 1953 and 1958, so that section 91(3) of the Act applied. That section reads as follows: —

"The Director General where it appears to him that —

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question."

The learned counsel further contended that this issue, if there was anything in it, should be raised by the appellant before the Special Commissioners for Income Tax to whom an appeal has in fact been lodged.

The view which we took was that there was no substance in what counsel for the appellant contended and that what counsel for the respondent said in reply had substantial merit in it. In our judgment limitation as such does not apply to any proceedings by the Government for the recovery of any tax. This would seem clear from the proviso to section 33(1) of the Limitation Ordinance 1953. Reading section 91 of the Income Tax Act, 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words "within twelve years after its expiration" are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment.

It was contended for the appellant that there was no allegation of wilful default in the affidavit in support of the plaintiff's application under Order 14. But the fact that additional assessments were made for the years of assessment 1953 and 1958 was sufficient to indicate such default. In any event, section 106(3) of the Income Tax, 1967 provides that "in any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5)." In the circumstances the learned judge had no power to entertain any of the pleas raised before him by the appellant in opposing the plaintiff's application for leave to sign final judgment.

For the reasons which we have stated we had no alternative but to dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Dato S.P. Seenivasagam & Co.*

RE CHOONG KHIAW REALTY CO. SDN. BHD.; TAN SWEE LIAN v. CHIA CHUNG MEE & ANOR.

[F.C. (Gill C.J. (Malaya) Ong Hock Sim and Raja Azlan Shah F.JJ.) April 19, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 13 of 1974]

Companies — Voluntary liquidation of company — Whether liquidator has power to split joint shares on application of one of joint holders — Whether liquidator can recall money properly paid out before his appointment as liquidator.

In this case the first and second respondents held in their own rights 4 and 5 shares respectively in a private limited company. The second respondent also held jointly with one of her step-brothers 10 shares, which it was alleged were to be held by them according to the instructions and wishes of their father, the founder of the company, in trust for the family's relatives in China. The second respondent also held 6 shares jointly with another of her stepbrothers. The company made a capital profit on the sale of a rubber estate and it was decided to pay advances from the capital profit to all the shareholders of the company at $6,090.38 per share. In respect of the joint holding of 10 shares, the second respondent and her stepbrother were paid a sum of $60,903.80 by cheques, for which the second respondent signed the receipt vouchers. In respect of the joint holding of the 6 shares, the second respondent and her other stepbrother were paid a sum of $36,542.20 by cheque, for which again the second respondent signed the acknowledgment receipt. Subsequently the company went into voluntary liquidation and the appellant was appointed the liquidator. The second respondent took out a summons in chambers to ask for orders that the shares which she held with her stepbrothers be split by the liquidator and that the liquidator should recover the sums paid on the joint shares and send the money from the 10 shares to relatives in China and pay to the second respondent her share of the advance on the 6 shares jointly held with her stepbrother. She also asked that the winding up should be conducted under the supervision of the court. The learned trial judge stated that he was not in a position to decide on the allegations of misfeasance and misconduct against the liquidator and the directors and therefore declined to make orders on the prayers relating to the splitting of the joint shares but he made orders on the remaining prayers for the liquidation in effect to be under the supervision of the court. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) the liquidator had no power to split the joint shares on the application merely of one of the joint holders without any reference to the other joint holders;

(2) the liquidator had no power to recall the moneys which had been properly paid out before she was appointed liquidator;

(3) no orders could therefore be made on the prayers relating to the splitting of the shares and the recovery of the moneys;

(4) in the circumstances the orders made on the other prayers in the summons in chambers would serve no purpose except to hold up indefinitely the winding up of the company, which after the payment of the capital profits to the shareholders, admittedly had very little money left for distribution.

Case referred to:-

(1) *Hill* v. *Permanent Trustees Co. of New South Wales* [1930] A.C. 720, 730.

FEDERAL COURT.

S.D.K. Peddie for the appellant.

Atma Singh Gill (*S.K. Lingam* with him) for the respondents.

Gill C.J. (Malaya): This is an appeal by the Liquidator in the voluntary winding-up of Choong Khiaw Realty Company Sendirian Berhad (hereinafter referred to as "the Company") from certain orders made by Wan Suleiman F.J., sitting as a High Court Judge, on the application of the respondents who are two of the contributories of the company. There is a cross-appeal by the respondents in relation to certain other orders which they sought in the same application but which were not granted.

The application by the respondents was made by way of summons in chambers in these proceedings which were commenced by an originating summons.

There is little or no dispute about the facts set out in the affidavits of the parties to the proceedings. The company was formed as a private limited company by one Hiu Nyuik Fong, with 250 fully paid up shares of $1,000 each, to manage a rubber estate in Ayer Kuning South in Negri Sembilan, about 4,030 acres in area, which the said Hiu Nyuik Fong had purchased in or around 1953. In the beginning he kept a major portion of the shares in his own name and distributed the remaining shares to all the members of his family, including the first respondent who is his second wife and the second respondent who is his daughter by the first respondent.

By 1969 due to old age and illness he had transferred all his shares to the members of his family and given up control of the company to his three sons, namely, Hiu Hon Leong as Managing Director, Hiu Hon Seng as Director and Hiu Hon Hing as Secretary of the Company. At that time the first and second respondents held in their own rights 4 and 5 shares respectively in the company. The second respondent also held jointly with her step-brother Hiu Hon Hing 10 shares which, it is alleged, were to be held by them according to their father's instructions and wishes in trust for the family's relatives in China. She further held 6 shares jointly with her step-brother Hiu Yoon Kien in their own rights. All the share certificates of the two respondents were kept in the father's safe for safe-keeping.

In or around October 1969 the three brothers sold the rubber estate for approximately $1,780,000 making a capital profit of $1,522,594.85. On or about November 15, 1969 they resolved to make advances from the said capital profit to all the shareholders of the company at $6,090.38 per share. The advances due to the shareholders were either paid to them or transferred from the company's accounts with the Mercantile Bank Seremban to fixed deposits with the bank in their respective names.

In respect of their joint holding of 10 shares Hiu Hon Hing and the second respondent were paid a sum of $60,903.80 vide Mercantile Bank Cheque No. G. 272187 for $12,180.76 and Mercantile Bank Cheque No. G. 272188 for $48,723.04 on November 15, 1969. The second respondent signed the acknowledgment receipt on vouchers No. SL. 710 and SL. 711 and she also signed the cheques. On the same day in respect of their joint holding of 6 shares Hiu Yoon Kien and the second respondent were paid a sum of $36,542.20 vide Mercantile Bank Cheque No. G. 672189. The second respondent acknowledged receipt on voucher No. SL. 712 and also signed the cheque.

Hiu Nyuik Fong died on November 24, 1969. By a resolution passed on February 20, 1970 the company went into voluntary winding-up and the appellant, who had been the auditor of the company, was appointed as the liquidator. Until then the respondents had not obtained the advances due to them on the shares which they held in the company in their own rights. Such advances had been placed on fixed deposits with the Mercantile Bank vide Fixed Deposit Receipts Nos. 114/468 and 114/467.

There was considerable correspondence by the respondents with the liquidator for the delivery up to them of their fixed deposit receipts with the bank. The liquidator asked for proof of their identities before she could do so. All their efforts to establish their identities having been rejected by the liquidator, the respondents took out an originating summons in the High Court at Seremban on March 18, 1972 asking for an order that the liquidator do return their fixed deposit receipts to them. They further asked for a declaration as to the ownership of their respective shares in the company. On June 19, 1972 the court made an order confirming the respondents' shareholdings in the company and requiring the liquidator to return their fixed deposit receipts to them. The court made a further order that the respondents as contributories of the company be at liberty to apply to the court in the same proceedings to determine any question as may arise in the voluntary winding-up of the company. The respondents were thus able to get the money in respect of the shares which they held in their own rights.

It was in respect of the shares which the second respondent held jointly with her two step-brothers that the second respondent took out a summons in chambers on January 10, 1973 from the determination of which this appeal has arisen. In this summons in chambers she asked, *inter alia*, for the following orders: —

1. That the liquidator do split the shares held jointly by the second respondent with her step-brothers;
2. That the liquidator do recover from Hiu Hon Leong and send to the relatives in China the sum of $60,903.80 in respect of the 10 joint shares;
3. That the liquidator do pay to the second respondent the sum of $18,271.14 being her share of the advance on the 6 shares held jointly by her with Hiu Yoon Kien;
4. That the liquidator do pay interest on the said sums at 6% per annum until date of payment;
5. That the liquidator be restrained from holding a final general meeting on January 21, 1973 until such time as the above orders have been complied with;

6. That the voluntary winding-up may continue but subject to supervision of the court and that the respondent do produce in court the books of the company for the period of winding-up and two years prior to the said winding-up;

7. That the Assistant Registrar do have full powers to subpoena any person to give evidence or produce any document touching and concerning the said voluntary winding-up under the supervision of the court.

In her affidavit dated January 9, 1973 in support of the summons in chambers the respondent said that she signed the two cheques in respect of the 10 joint shares in the presence of her ailing father who lay in bed on the assurance given by her step-brother Hiu Hon Leong that the proceeds of the cheques would be remitted to China, which had not been done up to then. As regards the cheque in the joint names of herself and her step-brother Hiu Yoon Kien, she said that she signed the cheque and the receipt on the undertaking by Hiu Hon Leong that he would get the same countersigned by the jointholder, cash the cheque and hand over half the proceeds thereof to her, which he had failed to do.

In her affidavit in reply to the summons in chambers the liquidator stated as follows. In her capacity as liquidator she had neither the duty nor the power to initiate steps for splitting of the joint shares. In any event, in the absence of the proper parties before it the court could not make an order for the splitting of the shares. As far as she was concerned, the cheques in favour of the joint shareholders were made out in favour of the proper persons who had duly signed the cheques and the receipts so that she had no further legal duties or responsibilities. She had no control over what the payees of the cheques did with the cheques, and had no evidence of any of the joint shares being held in trust, as companies are not permitted to allow trusts to appear on their registers.

At the hearing of the summons in chambers the learned judge took the view that on the affidavits before him he was not in a position to decide on the allegations of misfeasance and misconduct against the liquidator and the three directors or on the allegations of fraud made against those directors. He therefore declined to make any orders on the first four prayers in the summons in chambers but proceeded to make the orders on prayers 5, 6 and 7.

Counsel for the appellant in opening his appeal on behalf of the liquidator stated as follows. There were 9 prayers in the summons in chambers. The learned judge made no orders on the first 4 prayers in relation to the splitting of the joint shares and the recovery by the liquidator of the money due on those share advances from the persons to whom they have been paid. In the circumstances, the further orders as regards the continuation of the voluntary winding-up under the supervision of the court should not have been made. The reason given by the judge for not making the orders on the first four prayers was that he could not decide on the allegations of misfeasance and misconduct against the liquidator and the three directors on the affidavits before him, but it was their contention before the learned judge that as the issues raised were in fact issues of law he was in a position to decide on the affidavits. Moreover, the learned judge had no jurisdiction to make the orders which he did as there is no provision in the Companies Act, 1965 for a voluntary winding-up under the supervision of the court as there is under the English Companies Act, 1948, and as there was under our old Companies Ordinance, 1946.

The learned counsel then referred to the defences which the liquidator had taken to the first four prayers and went on to say that the liquidator had no power to split the shares and that the moneys which the respondents were claiming in prayers 2 and 3 were not moneys belonging to the company which should be paid or repaid to the company. They were moneys which the directors had legally and properly paid out, so far as the company was concerned, before the liquidator was appointed. The allegation made was misappropriation of the proceeds of the cheques by one of the recipients in each case. The proceedings by way of summons in chambers were brought on January 10, 1973 but up to now no action had been brought by the respondents against any of the directors who were alleged to have defrauded her.

Counsel for the respondents referred to the very wide powers of the court under sections 243 to 253 of the Companies Act, 1965 and said that the orders made by the judge were made under section 274. He then referred to the order made on the originating summons of June 19, 1972 to the effect that the applicants (respondents to this appeal) as contributories of the company may be at liberty to apply to the court in these proceedings to determine any question in the voluntary winding-up of the company as there may be occasion. As regards the cross-appeal he submitted that the learned judge erred in law and in fact by refusing to make the orders on the first four prayers.

In my opinion the answers to this appeal and the cross-appeal lie in the answers to the two questions as to whether or not a liquidator has any power to split the joint shares on the application merely of one of the joint holders without any reference to the other joint holder and whether or not she can recall the moneys which had been properly paid out before she was appointed liquidator in voluntary liquidation of the company. In my judgment the answer to each of these questions must be in the negative.

Although counsel for the respondents stated from the bar that the liquidator was in possession of a document of trust in relation to the 10 shares alleged to have been held by the second respondent and her step-brother Hiu Hon Hing jointly for the benefit of the relatives in China, there is no evidence whatsoever that there is in fact such a document in existence. Assuming that the shares were held in trust, it is for the second respondent to take such action as she may be advised against her co-trustee for the enforcement of the trust or for severance of the trust funds. In all the circumstances of the case I do not think the liquidator is under any obligation to take action against any of the former officers of the company to recover from them moneys which were paid to them on proper receipts having been obtained. In *Hill* v. *Permanent Trustees Co. of New South Wales*[1] Lord Russell of Killowen said:

"A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not."

It would seem clear from what I have said that no orders could rightly be made on the first four prayers of the summons in chambers taken out by the respondent. In the circumstances the orders made by the learned judge on the other prayers in the summons in chambers, except the one relating to costs, would serve no purpose except to hold up indefinitely the winding-up of the company which, after the payment out of the capital profits to the shareholders, admittedly has very little money left for distribution.

I would therefore allow the appeal, setting aside the orders made by the learned judge, and dismiss the cross-appeal. Costs of all parties as between solicitor and client both here and in the court below to be paid out from the funds in the hands of the liquidator.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; Atma Singh Gill & Gill.*

HOW LOON SIM v. LIPSON REALTY (MALAYA) SDN. BHD.

[F.C. (Gill C.J. (Malaya) Ong Hock Sim and Raja Azlan Shah F.JJ.) April 19, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 27 of 1975]

Contract — Building contract — Additional earth cutting works — Lump sum contract — Contract completed — Full sum payable — Payment of architect's fee for abandoned work — Liability of land owner — Delay in completion — Contracts Act, 1950, ss. 70, 71 and 74.

This was an appeal from the decision of the learned trial judge in a civil suit in which the appellant, a building contractor, claimed the sum of $43,703.19 from the respondents, a housing development company for earth cutting, road levelling and drainage works. The learned trial judge awarded only a sum of $29,303.19 (after making a deduction for work not completed before the specified date) and allowed a counterclaim of $12,500 in respect of architectural fees. He dismissed a counterclaim of $81,152.33 in respect of bank interest incurred by the respondents.

Held: (1) in this case as the defence was a denial of liability and no objection was made to the quality or quantity of the work done and as it was admitted that the appellant had carried out the earth cutting, road levelling and drainage works and had completed them, the full sum as claimed without deduction, should have been awarded;

(2) the normal rule is that architectural fees are chargeable to the owner and there was no evidence in this case which would impose obligation on the appellant to pay the architect's fees for the abandoned work;

(3) the payment made could not be recovered from the appellant under either section 70 or section 71 of the Contracts Act;

(4) the learned trial judge was correct in holding that the respondent could not succeed on the counterclaim as the delay in completion was initially caused by the failure of the respondent's architect to secure approval of the plans relating thereto.

Cases referred to:-

(1) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

(2) *Blay* v. *Pollard and Morris* [1930] 1 K.B. 628, 634.

(3) *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, 180-181.

(4) *Abraham Ho Ah Loke* v. *William Manson-Hing* [1949] M.L.J. 37.

(5) *Yung Book Fong* v. *Nallakaruppan Chettiar & Ors.* [1972] 1 M.L.J. 13.

(6) *Owen* v. *Tate & Anor.* [1975] 3 W.L.R. 369, 373, 377.

(7) *Holme & Anor.* v. *Guppy & Anor.* 150 E.R. 1195.

(8) *In re Garrud, ex parte Newitt* (1881) 16 Ch.D. 522, 529.

FEDERAL COURT.

Chin Yew Meng for the appellant.

R.R. Sethu for the respondents.

Ong Hock Sim F.J.: This is an appeal by the appellant, a building contractor, against the respondents, a housing development company, from that part of the judgment of the learned judge in Civil Suit No. 1502 of 1970 awarding a sum of $29,303.19 as against the sum claimed of $43,703.19 with interest and costs and awarding a sum of $12,500 in respect of architectural fees on the respondents' counterclaim in the same suit. There is also a cross-appeal against the award of $29,303.19 with interest and costs and dismissal of the respondents' amended counterclaim for the sum of $81,152.33 in respect of bank interest incurred by the respondents with the Bank of Canton from the 29th day of September 1967 to the 29th day of December 1969. There is no appeal in respect of Civil Suit No. 1286/70 which was consolidated and heard together with Civil Suit No. 1502/70. The trial was unnecessarily protracted and complicated by differences and disputes over the accounts and construction of the houses and delays over plans and completion, but as recorded by the learned trial judge:—

"At the conclusion of the hearing counsel for the plaintiff and counsel for the defendants submitted a statement of agreed issues in dispute —

Plaintiff's claim: 'Delivery of 8 qualified titles i.e. Q.T.(M) 452 to 459 (both inclusive) for Lots Nos. 283 to 290 (both inclusive) in Section 99, Town and District of Kuala Lumpur and the relevant transfers executed by the defendants' company to the plaintiff as contained in paragraphs 8(a) and (b) page 3 of the Bundle of Pleadings.

(2) $48,000 in respect of earth-cutting and road levelling works and drainage for 24 lots at $2,000 per lot as contained in page 5 of Supplementary Pleadings Appendix 'X' under entry dated July 14, 1965.

Defendant's counterclaim: Kok Kwin Lim (Repair on your behalf) $1,445 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $1,445.

(2) Retaining Wall for Sub-Lot (1) $2,500 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $2,500.

(3) Approach road 9 houses at $450 each $4,050 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $2,250.

(4) Architectural Fee for abandoned job $12,500 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $12,500.

(5) Watchman's wages from 1968 to 1969 at $100 per month — $2,400 — as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $2,400.

(6) Fencing and gates for 4 houses at $420 each as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $840.